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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
9 **AT SEATTLE**

10 CARMEN McELHANEY,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner of
14 Social Security,

15 Defendant.

NO. C10-5387-JPD

ORDER

16 Plaintiff Carmen McElhaney appeals the final decision of the Commissioner of the
17 Social Security Administration (“Commissioner”) which denied her applications for Disability
18 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33,
19 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,
20 the Commissioner’s decision is reversed and remanded for further proceedings.

21 **I. FACTS AND PROCEDURAL HISTORY**

22 At the time of her administrative hearing, plaintiff was a 47 year-old woman with a
23 associate arts degree. Administrative Record (“AR”) at 27. Her past work experience includes
24 employment as a bus driver and work at an antique store. AR at 28. Plaintiff was last
25 gainfully employed in 2004. *Id.*
26

1 On February 14, 2006, plaintiff filed a claim for DIB payments, asserting an onset date
2 of April 15, 2004. AR at 116. Plaintiff asserts that she is disabled due to obesity, degenerative
3 joint disease of the knees, obstructive sleep apnea, diabetes, depressive disorder, severe neck
4 impairment and urinary incontinence. AR at 11-15.

5 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 9.
6 Plaintiff requested a hearing which took place on February 5, 2008. AR at 24-80. On March
7 28, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits. AR at 9-
8 20. Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council
9 on April 9, 2010, AR at 1-3, making the ALJ's ruling the "final decision" of the Commissioner
10 as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action
11 challenging the Commissioner's decision. Dkt. No. 3.

12 II. JURISDICTION

13 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
14 405(g) and 1383(c)(3).

15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
17 social security benefits when the ALJ's findings are based on legal error or not supported by
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
19 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
21 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
25 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
26 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is

1 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
2 must be upheld. *Id.*

3 The Court may direct an award of benefits where "the record has been fully developed
4 and further administrative proceedings would serve no useful purpose." *McCartey v.*
5 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
6 (9th Cir. 1996)). The Court may find that this occurs when:

7 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
8 claimant's evidence; (2) there are no outstanding issues that must be resolved
9 before a determination of disability can be made; and (3) it is clear from the
10 record that the ALJ would be required to find the claimant disabled if he
11 considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
13 erroneously rejected evidence may be credited when all three elements are met).

14 IV. EVALUATING DISABILITY

15 As the claimant, Ms. McElhaney bears the burden of proving that she is disabled within
16 the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
17 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
18 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
19 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
20 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
21 are of such severity that she is unable to do her previous work, and cannot, considering her age,
22 education, and work experience, engage in any other substantial gainful activity existing in the
23 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
24 99 (9th Cir. 1999).

25 The Commissioner has established a five step sequential evaluation process for
26 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At

1 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
2 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
3 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
4 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
5 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
6 or more medically severe impairments, or combination of impairments, that limit her physical
7 or mental ability to do basic work activities. If the claimant does not have such impairments,
8 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
9 impairment, the Commissioner moves to step three to determine whether the impairment meets
10 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
11 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
12 twelve-month duration requirement is disabled. *Id.*

13 When the claimant’s impairment neither meets nor equals one of the impairments listed
14 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
15 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
16 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
17 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
18 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
19 true, then the burden shifts to the Commissioner at step five to show that the claimant can
20 perform other work that exists in significant numbers in the national economy, taking into
21 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§
22 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the

25 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On March 28, 2008, the ALJ issued a decision finding the following:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2009.
2. The claimant has not engaged in substantial gainful activity since April 15, 2004, the alleged onset date.
3. The claimant has the following severe impairments: obesity, degenerative joint disease of the knees, obstructive sleep apnea, diabetes, and a depressive disorder
4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) except she is limited to simple and routine tasks.
6. The claimant is unable to perform any past relevant work.
7. The claimant was born on XXXXX, 1960² and was 43 years old, which is defined as a younger individual age 18-49, on the alleged disability onset date.
8. The claimant has at least a high school education and is able to communicate in English.
9. Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled," whether or not the claimant has transferable job skills.

² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

11. The claimant has not been under a disability, as defined in the Social Security Act, from April 15, 2004 through the date of this decision.

AR at 11-19.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Did the ALJ properly evaluate the medical evidence?
2. Did the ALJ properly evaluate the lay witness statements?
3. Did the ALJ err in his RFC assessment?
4. Did the ALJ err in his hypothetical by failing to include all of plaintiff's non-exertional limitations? And
5. Did the ALJ err in relying upon vocational expert ("VE") testimony?

Dkt. No. 15 at 2. The ALJ's errors relating to plaintiff's financial inability to afford treatment, incontinence, and treatment of lay witness statements affect the entire proceedings and therefore require remand. Accordingly, the Court's opinion will focus on these issues. As will be made apparent, the effect of this ruling will require the ALJ to reevaluate all of the medical evidence, call a new VE, reassess the RFC and lay witness testimony.

VII. DISCUSSION

A. Standards for Reviewing Medical Evidence

As a matter of law, more weight is given to a treating physician's opinion than to that of a non-treating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.

1 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
2 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
3 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
4 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough
5 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
6 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
7 merely state his conclusions. “He must set forth his own interpretations and explain why they,
8 rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
9 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,
10 157 F.3d at 725.

11 The opinions of examining physicians are to be given more weight than non-examining
12 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
13 uncontradicted opinions of examining physicians may not be rejected without clear and
14 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
15 physician only by providing specific and legitimate reasons that are supported by the record.
16 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

17 Opinions from non-examining medical sources are to be given less weight than treating
18 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
19 opinions from such sources and may not simply ignore them. In other words, an ALJ must
20 evaluate the opinion of a non-examining source and explain the weight given to it. Social
21 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
22 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a
23 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is
24 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
25 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

1 B. Plaintiff's Failure to Obtain Treatment

2 The ALJ discounted plaintiff's urinary incontinence (AR at 15), her mental
3 impairments (AR at 14), and her diabetes (AR at 17-18), based on plaintiff's failure to obtain
4 treatment and suggested that plaintiff's claims of poverty were not well-founded in light of her
5 smoking addiction. Specifically, the ALJ held

6 The claimant testified to numerous problems and the inability to pay for her
7 medical care. However, the evidence shows that the claimant has reported
8 smoking a pack of cigarettes a day. If the claimant is able to pay for a pack of
9 cigarettes a day for a condition that her doctors have advised her to stop, and
10 she has, in the past been able to stop for six years, she should be able to pay her
sliding scale medical payment and some additional medications. Additionally,
the claimant is still married and her husband works and has a legal obligation to
help support her, so she should have an additional source of income.

11 AR at 17.

12 The Commissioner may deny benefits if the "claimant meets the disability criteria but
13 fails to obtain treatment that would ameliorate his condition." *Gamble v. Chater*, 68 F.3d 319,
14 321 (9th Cir. 1995) (interpreting 20 C.F.R. §§ 404.1530 and 416.930). However, "the inability
15 to afford treatment is among the circumstances that justify the failure to obtain it." *Id.* (citing
16 Social Security Ruling 82-59). "[B]enefits may not be denied to a disabled claimant because
17 of a failure to obtain treatment that the claimant cannot afford." *Warre v. Comm'r of Social*
18 *Sec. Admin.*, 439 F.3d 1001, 2006 (9th Cir. 2009) (citing *Gamble*, 68 F.3d at 321). "This rule
19 implements the agency's official policy: Social Security Ruling (hereinafter "SSR") 82-59
20 provides that an individual's failure to follow prescribed treatment is justifiable if the
21 individual is unable to afford such treatment." *Id.* "Thus, a claimant who meets the disability
22 criteria may not be denied benefits if he is unable to afford the treatment that would help him."
23 *Gamble*, 68 F.3d at 321. *See also, Regennitter v. Comm'r. of Soc. Sec.*, 166 F.3d 1294 (9th
24 Cir. 1999).

25 There are two problems with the Commissioner's analysis. First, failure to follow a
26 diagnosis to quit smoking may not generally be used against a plaintiff's credibility unless the

1 cessation would restore a plaintiff's ability to work and the record supported this finding.

2 *Rousey v. Heckler*, 771 F.2d 1065, 1069 (7th Cir. 1985). In *Shramek v. Apfel*, 226 F.3d 809 ,
3 813 (7th Cir. 2000), the court held

4 We note that even if medical evidence had established a link between smoking
5 and her symptoms, it is extremely tenuous to infer from the failure to give up
6 smoking that the claimant is incredible when she testifies that the condition is
7 serious or painful. Given the addictive nature of smoking, the failure to quit is
8 as likely attributable to factors unrelated to the effect of smoking on a person's
9 health. One does not need to look far to see persons with emphysema or lung
10 cancer – directly caused by smoking – who continue to smoke, not because they
11 do not suffer gravely from the disease, but because other factors, such as the
12 addictive nature of the product impairs their ability to stop. This is an
13 unreliable basis on which to rest a credibility determination.

14 Although the Ninth Circuit has not directly addressed the issue, it has found in an
15 analogous situation that an ALJ errs when he makes an adverse credibility determination based
16 on the inability of an obese person to lose weight. *See, e.g., Orn*, 495 F.3d at 637-38, and
17 Social Security Ruling 02-1p at 2, 8-9; 67 Fed. Reg. at 57,861-64..

18 The second error is that the ALJ assumed with no foundation that the cost of a pack of
19 cigarettes would cover plaintiff's costs for medical treatments for her mental health issues, her
20 incontinence, and her diabetes. There is no support in the record for this assumption.

21 Although the ALJ noted that plaintiff attended a "sliding scale" community health provider,
22 there is nothing in the record that would support an inference that by skipping some cigarettes,
23 she would have had the ability to afford medical treatment for her incontinence, her diabetes,
24 and her mental health issues. Because the ALJ focused so much of his discounting of
25 plaintiff's impairments on the fact that she smoke rather than used these "savings" on medical
26 provisions, this matter must be remanded for further proceedings for the ALJ to assess
27 plaintiff's significant impairments and her RFC without benefit of doubting the severity based
28 on her failure to obtain treatment due to her smoking addiction.

1 C. Plaintiff's Incontinence

2 1. *Jerry Rusher, M.D.*

3 Dr. Rusher evaluated plaintiff May 9, 2006. AR at 407-413. Dr. Rusher diagnosed
4 plaintiff with post myocardial infarction, obstructive sleep apnea and narcolepsy, chronic left
5 knee pain secondary to degenerative joint disease, chronic neck pain, chronic low back pain
6 with a history of scoliosis. AR at 412. He opined she could be expected to stand and walk no
7 more than four hours in an eight-hour workday, and that she could only sit less than six hours
8 in an eight-hour work day. *Id.* He noted she was wearing an adult diaper apparently due to a
9 "rather severe problem" with urinary incontinence which would be expected to "impact her
10 functioning in the workplace," and that she used a cane. He also found manipulative limitations
11 on reaching, handling, feeling, grasping and fingering. *Id.*

12 2. *Terry Mallory, ARNP*

13 Terry Mallory is an adult nurse practitioner who was plaintiff's principal medical
14 contact. On March 2006, she completed a Department of Social and Health Services
15 ("DSHA") physical evaluation form, in which she found plaintiff suffered from similar
16 problems that Dr. Rusher diagnosed. AR at 380, 382. As to plaintiff's incontinence, Nurse
17 Mallory noted "she has almost no bladder control—this makes it difficult to function in any
18 public/social/business work place setting." AR at 383.

19 3. *Other Medical Records*

20 That plaintiff suffers from incontinence is also evidenced by other medical records. AR
21 at 440, 442 which relate to plaintiff's follow-up on her diabetes impairment, found severe by
22 the ALJ.

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1 4. *ALJ's Treatment of Incontinence*

2 Although substantial evidence of plaintiff's incontinence was before the ALJ, the issue
3 was dismissed as being a mere symptom, rather than a diagnosis, and discounted because
4 plaintiff failed to undertake tests necessary to determine the cause. AR at 15. The ALJ erred
5 on both counts.

6 Although urinary incontinence is, in fact, a symptom rather than a diagnosis, it is
7 closely associated with diabetes. The record is replete with references to plaintiff suffering
8 from diabetes. There are also numerous references discussed above that evidence plaintiff's
9 incontinence. If the ALJ actually had questions about the relationship between diabetes and
10 incontinence, he had a duty to inquire and to further develop the medical record. *Smolen v.*
11 *Chater*, 80 F.3d 1273 (9th Cir. 1996). There is little doubt that this could have an impact on
12 the employability of plaintiff, a matter acknowledged by the VE. AR at 69-70, 78-79.

13 Moreover, as discussed above, the ALJ erred by discounting plaintiff's urinary
14 incontinence based on her failure to obtain treatment and suggested that plaintiff's claims of
15 poverty were not well-founded in light of her smoking addiction. This error should be
16 remedied on remand.

17 D. Lay Witness Testimony

18 Due to her financial circumstances, plaintiff's primary medical provider appears to be
19 Nurse Mallory. In order to determine whether a claimant is disabled, an ALJ may consider lay
20 witness sources, such as testimony by nurse-practitioners, physicians' assistants, and
21 counselors, as well as "non-medical" sources, such as spouses, parents, siblings, and friends.
22 20 C.F.R. § 404.1513(d). Such testimony regarding a claimant's symptoms or how an
23 impairment affects his ability to work is competent evidence and cannot be disregarded
24 without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). This is particularly
25 true for such "non-medical" sources as nurses and medical assistants. *See Social Security*
26 *Ruling ("SSR") 06-03p* (noting that because such persons "have increasingly assumed a greater

percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists,” their opinions “should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.”³ If an ALJ chooses to discount testimony of a lay witness, especially a treating physician’s assistant, he must provide “reasons that are germane to each witness,” and may not simply categorically discredit the testimony. *Id.* at 919.

The ALJ substantially ignored all of Nurse Mallory’s findings and opinions without comment. This includes, but is not limited to, Nurse Mallory’s findings that plaintiff had decreased internal rotation of her right shoulder, decreased abduction of her left shoulder and bilateral upper back and shoulder pain, interfering with her ability to lift, handle and carry. AR at 381-82. This, of course, would be consistent with the findings of Dr. Rusher, rejected by the ALJ (AR at 15, 18) that plaintiff had limited ability to handle and finger based on neck pain. Because the ALJ neglected to provide “reasons germane” to Nurse Mallory’s opinions, this matter must be remanded for further proceedings.

The ALJ also erred by neglecting to deal with the lay witness statements of Susan Skovald and Jacqueline Strange. AR at 22-23, 231-32. This error should be corrected on remand.


VIII. CONCLUSION

For the foregoing reasons, this matter is REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court’s instructions. The ALJ is directed to reevaluate all of the medical evidence, reevaluate plaintiff’s RFC, reassess her

³ Social Security Rulings do not have the force of law. Nevertheless, they “constitute Social Security Administration (SSA) interpretations of the statute it administers and of its own regulations,” and are binding on all SSA adjudicators. 20 C.F.R. § 402.35(b); *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001). Accordingly, such rulings are given deference by the courts “unless they are plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 credibility, and call a VE to testify about whether there are any jobs that exist that a person
2 with all of plaintiff's limitations can perform.

3 DATED this 21st day of March, 2011.

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5 JAMES P. DONOHUE
6 United States Magistrate Judge
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